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JUN - 5 1998

June 5, 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

EX PARTE SUBMISSION

DOCKET FILE COPY ORIGINAL

Re: Written Presentation in CC Docket No. 97-213 and DA 98-762

Dear Ms. Salas:

Representatives of the Telecommunications Industry Association ("TIA") met with staff members of the Commission's Office of Engineering and Technology and the Wireless Telecommunications Bureau on June 2, 1998. During the meeting, TIA discussed various arguments that have been raised by the parties to these proceedings with respect to forbearance agreements, blanket extensions, milestones for compliance under any order that might be issued, the potential effect of alleged "out-of-switch solutions," and the need for development of law enforcement test equipment. An *Ex Parte Notice* regarding this meeting has already been submitted.

Pursuant to § 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, enclosed please find for filing an original and two copies of TIA's response to a Commission staff request for further elaboration of some of the issues discussed during that meeting.

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Ms. Magalie Roman Salas
June 5, 1998
Ex Parte Submission

Please do not hesitate to contact the undersigned if you have any questions.

Respectfully submitted,



Thomas M. Barba

*Counsel for Telecommunications
Industry Association*

Enclosures

cc (w/encl.): service list in CC Docket No. 97-213, DA 98-762

The Honorable Janet Reno
The Honorable Louis J. Freeh
The Honorable Steve Colgate
Larry R. Parkinson
Douglas N. Letter
H. Michael Warren

David Wye
Tim Maguire
Rodney Small
Charles Iseman
Scott Thayer
Julius Knapp
Kelly Quinn
Kim Parker
Lawrence Petak

RESPONSE TO COMMISSION REQUEST FOR FURTHER ELABORATION ON SEVERAL ISSUES

Pursuant to § 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, the Telecommunications Industry Association ("TIA"),¹ respectfully submits this response to a Commission staff request for further elaboration on several issues regarding the Commission's *Public Notice* in this proceeding.²

I. Introduction

On May 15, 1998, the Department of Justice ("Department") and Federal Bureau of Investigation ("FBI") filed their joint *Reply Comments*, responding to the Commission's request for comments on extension of the October 25, 1998 capability compliance date for the Communications Assistance for Law Enforcement Act ("CALEA").³ These comments included several new ideas not previously presented before the Commission. Subsequently, the FBI participated in an *ex parte* meeting with the Commission staff, discussing these new issues.

In their comments, the FBI and Department made no effort to rebut the overwhelming record before the Commission, demonstrating the necessity for extensions of the assistance capability compliance date. Instead, they have focused on: (1) challenging the Commission's ability to grant blanket extensions, (2) dissuading the Commission from granting

¹ TIA is a national, full-service trade association of over 900 small and large companies that provide communications and information technology products, materials, systems, distribution services and professional services in the United States and around the world. TIA is accredited by the American National Standards Institute ("ANSI") to issue standards for the industry.

² Public Notice, *In the Matter of Communication Assistance for Law Enforcement Act*, DA No. 98-762, CC Docket No. 97-213 (released on April 20, 1998) ("Public Notice").

³ Pub. L. 103-414, 108 Stat. 4279 (1994), *codified at* 47 U.S.C. §§ 1001 *et seq.*

any extensions (individual or blanket) and suggesting, instead, an extra-statutory alternative -- "forbearance agreements" between the Department and individual companies, and (3) encouraging the Commission, "should [it] nevertheless grant extensions," to impose several restrictions on such extensions.⁴

The first issue, the Commission's statutory authority to grant industry-wide extensions, has been addressed by the overwhelming majority of commenters and an ample record already exists before the Commission. Several aspects of the second and third issues, however, appear in the FBI's reply comments for the first time. TIA appreciates the Commission's permission to file this brief response, addressing these two issues.

II. Forbearance Agreements

Ironically, after filing both initial and reply comments that ask the Commission not to exercise an authority explicitly provided for in CALEA -- i.e., the granting of industry extensions -- the FBI now asks the Commission to approve an alternative that is mentioned nowhere in the statute. Not only is the FBI's forbearance proposal devoid of any statutory basis, it is expressly contrary to Congress's intention that the Commission, and not the FBI or Department of Justice, monitor and resolve disputes regarding implementation of CALEA's capability requirements.

Moreover, unlike an extension issued by the Commission, a forbearance agreement would not protect companies against enforcement actions brought by state or local

⁴ Joint Reply Comments of the United States Department of Justice and Federal Bureau of Investigation, CC Docket No. 97-213, summary (filed on May 15, 1998) ("Joint Reply Comments").

law enforcement authorities in the courts of their choice. The best that the Department is able to offer is that it would attempt to dissuade such actions.⁵

Nothing in the statute precludes a company from reaching an agreement with the Department and jointly petitioning the Commission to grant an extension on the basis of that agreement. What TIA and its members object to, however, is the FBI's insistence that such agreements become mandatory, either as a replacement for, or a prerequisite to, the Commission's ability to grant extensions.

What's more, the forbearance approach is almost certainly doomed to fail. Since at least the end of 1996, all of the major telecommunications manufacturers (both individually and through TIA) have conducted one negotiation after the other with the FBI. Such negotiations literally consumed the TR 45.2 process after the subcommittee introduced its draft standard in late 1995. Then, at the end of 1996 and in early 1997, several manufacturers and carriers participated in a series of negotiations with the FBI over its proposed "Cooperative Agreement." More recently, from November 1997 through March 1998, TIA, the Cellular Telecommunications Industry Association, the Personal Communications Industry Association and the United States Telephone Association participated in a series of intensive negotiations, conducted under the auspices of the Attorney General.

All of these good faith efforts failed. There is simply no basis in history, or in the FBI's filings, to believe that negotiations will be more successful now than in the immediate past. No matter how much flexibility industry has presented or how many concessions industry

⁵ Joint Reply Comments, ¶ 17.

has made, the FBI remains inflexible, demanding that CALEA be implemented exactly as it specifies. This inflexibility is reflected throughout the FBI's reply comments.

It is true that the Department and FBI have now indicated that they "*will not require manufacturers and carriers to provide the "punch list" capabilities in order to be offered enforcement forbearance . . .*"⁶ True to industry's experience, however, the punch list still manages to work its way into the FBI's requirements. First, it is reflected in the Department's insistence that any extensions expire upon the completion of a solution that "substantially facilitates compliance" with CALEA's capability requirements.⁷ The solution that the FBI and Department mention -- the Bell Emergis product -- was built to law enforcement's stated requirements, not J-STD-025, and contains several of the punch list features. As discussed below, this raises the prospect that as soon as it finds a solution that provides more than the industry standard, the FBI will revoke all carriers' extensions and force them to purchase that solution under threat of punitive daily fines.

Second, both in its comments and in discussions with industry, the FBI has insisted that manufacturers design a solution "in a manner that does not impede, *and will indeed facilitate*, the future addition of punch list features."⁸ Evidently, the FBI intends to be the arbiter of how much work must be done to facilitate addition of the punch list. Based on past experience, this vague language will be interpreted by the FBI as requiring each item of the list to be nearly completed. Or, to paraphrase the FBI's comments, manufacturers will not be required to provide the punch list capabilities -- just 75% of them.

⁶ *Id.*, ¶ 18 (emphasis in original).

⁷ *Id.*, ¶ 21.

⁸ *Id.*, ¶ 20 (emphasis added).

Finally, although not mentioned in the reply comments, industry has repeatedly inquired about the FBI's eventual provision of a "collection box" and test script for testing the interface between law enforcement and each manufacturers' J-STD-025 solution. As TIA has previously indicated, the absence of this collection box threatens to further delay compliance.⁹ The FBI has indicated that it is contracting for such a box, but -- like the Bell Emergis product -- it is not to be built to J-STD-025 but to the FBI's view of its needs (including the punch list).

III. FBI's Proposed Requirements to Commission Extension Orders

In addition to challenging the Commission's statutory authority to grant extensions on an industry-wide basis (in favor of a non-statutory alternative), the Department and FBI urge the Commission, "should [it] nevertheless grant extensions," to impose several, specific restrictions on such extensions.

A. December 1999

First, the Department and FBI urge the Commission to limit any extension to two years from the date of publication of J-STD-025 (i.e., December 1999). The theory evidently is that manufacturers should have started building to the standard as soon as it was adopted last December. But this is the very same standard that the FBI has been criticizing (and threatening to challenge) since before its formal adoption. Contrary to the FBI's current assertion that "it is *undisputed* that J-STD-025 is a safe harbor," for the last several months the FBI has argued exactly the opposite, creating great uncertainty about the future of the standard and causing manufacturers to hesitate to proceed beyond initial design to full-scale development.

⁹ Reply Comments of the Telecommunications Industry Association, CC Docket No. 97-213, at 10 (filed on May 15, 1998); Comments of the Telecommunications Industry Association, CC Docket No. 97-231, at 12-13 (filed on May 8, 1998).

Contrary to the FBI's suggestions, manufacturers are not trying to avoid their obligations under CALEA. Manufacturers have devoted enormous resources over the past three years to implementing CALEA and want to see this obligation resolved in the most expeditious and cost effective manner possible. An extension of the deadline that requires manufacturers to make J-STD-025 solutions generally available by December 1999, however, simply is not sufficient time for all manufacturers and all switch platforms.

B. "One-time extension"

In addition, the FBI asserts that the Commission "should also make clear that no further extensions will be available when the first one has expired (unless new carrier-specific justifications for extensions have arisen). . . ." ¹⁰ Section 107(c), of course, expressly provides for "1 or more" extensions.

Obviously, to the extent the Commission's initial extension is consistent with manufacturers' current development schedules, additional extensions will not be as necessary. For example, if the Commission were to grant an extension until only December 1999, TIA is confident that the Commission will face a second round of requests for extensions.

Most manufacturers expect to be able to make the equipment and software upgrades necessary to implement J-STD-025 commercially available by October 25, 2000. Even once these J-STD-025 solutions are generally available, however, it is quite possible that some carriers will need limited extensions so that they can install and test equipment and so that manufacturers can make modifications to their solutions on the basis of those tests.

¹⁰ Joint Reply Comments, ¶ 20.

C. “Milestones”

The FBI has also suggested that the Commission mandate that manufacturers and carriers “certify to the Commission and the Department of Justice that they have passed specific ‘milestones’ in the design and development process by specified dates during the extension period.”¹¹

The Commission should understand that the FBI’s proposed use of “milestones” is not common industry practice. Manufacturers and carriers do not normally create contractual obligations around anything other than the final delivery date and manufacturers almost never share their internal milestones with customers. Milestones are established only for internal management purposes and usually are only approximate in nature. Indeed, manufacturers often miss internal milestones and still meet their final delivery date.

Moreover, internal milestones and development procedures are sensitive, proprietary information for manufacturers, and TIA’s members are reluctant to discuss such subjects in public. Manufacturers have varying development procedures and “generic” stages are not easily identified. Thus, if the Commission were to require milestones, TIA suggests that the Commission provide for confidential submissions by manufacturers and be willing to accept that each manufacturer identify its own internal milestones.

Although milestones are not specifically provided for in CALEA and face these obstacles to implementation, TIA’s members, in general, do not oppose some form of periodic progress reports to the Commission. TIA would suggest that the Commission require that industry participants file a periodic, confidential report, apprising the Commission of the progress being made by the company.

¹¹ *Id.*

D. Consult with Law Enforcement

In addition to certifying completion of certain milestones, the FBI requests that industry "be required to consult in good faith with law enforcement during the extension period."¹² TIA is unsure of the purpose of such consultations. For the last three years, manufacturers have engaged in nearly endless consultations with the FBI -- and have nothing to show for it.

TIA and its members continue to have the highest regard for the FBI as an investigative and law enforcement agency. However, the past three years have demonstrated that the same skills and experience that make the FBI such an efficient and successful law enforcement body make it a poor industry regulator. The FBI is unwilling to let industry implement achievable objectives in a cost-efficient method. Instead, the FBI has constantly sought to micromanage each manufacturer's proposed solution, demanding more and more information but never telling a manufacturer whether its solution is acceptable. The FBI's proposed consultation requirement is unfortunately discredited by this history. Since it is also lacking in statutory support, the proposal should be rejected.

E. "Substantially Facilitating Solutions"

Finally, the FBI requests that any extension "will terminate if and when a compliance solution that substantially facilitates compliance on an industry-wide basis becomes available."¹³ Specifically, the FBI mentions the product being prepared by Bell Emergis -- Intelligent Signalling Technologies.

¹² *Id.*

¹³ *Id.*, ¶ 21.

TIA is surprised by the FBI's statements. As Bell Emergis' own comments demonstrate, its proposed solution: (1) does not fully satisfy the capability requirements of J-STD-025 (although it apparently does provide the punch list), (2) requires unspecified modifications to carriers' switches (what types of modifications has not yet been identified); and (3) will not be available by October 25, 1998.¹⁴

Carriers who have tested the proposed solution have found it to be incomplete and to require extensive modifications to their networks and switches. They have also expressed concern at the prospect of inserting into their system a foreign box that has not been designed by their standard vendors or to any known industry standard; this will add additional failure points to their systems.¹⁵

What's more, this proposal would convert the FBI into the agency that decides the meaning of CALEA, allowing it to favor certain manufacturers that do not have to meet all of CALEA's requirements. What requirements will the FBI deem to "substantially facilitate" CALEA compliance? What standards will the FBI apply in making this determination? And, if the FBI is willing to accept a solution that only "substantially facilitates" compliance, then why has it challenged the industry standard for the past three years? Industry, privacy groups and even law enforcement no doubt would agree that J-STD-025 "substantially facilitates" law enforcement's ability to conduct wiretaps. The standard encompasses the overwhelming majority of features requested by law enforcement.

¹⁴ Comments of Bell Emergis - Intelligent Signalling Technologies, CC Docket No. 97-213, at 4 & 3 (filed on May 8, 1998).

¹⁵ In addition, manufacturers who have reviewed the idea are concerned that the required changes to a switch would enable switch technicians, who are not authorized to implement an interception, to obtain information on wiretaps.

The proposal suggests as well that the FBI, after pressing manufacturers to force the pace of CALEA design, now seeks to reserve the right to make that entire effort irrelevant by adopting a third-party, off-board solution without compensating switch manufacturers for their wasted efforts. Why would the FBI insist that manufacturers continue to devote valuable engineering resources developing solutions, on an expedited basis, that the FBI apparently has no interest in having installed? Under this "kick-out" proposal, as soon as the FBI's favored solution became available, carriers would be forced to purchase that solution or face fines; manufacturers would simply have to discard their work. Moreover, manufacturers would then have to devote additional resources to make any of the modifications in the carrier's switches that are necessary to interface with this solution, almost certainly setting off a new round of extension requests.

If the FBI continues to assert that switch manufacturers must proceed with development, and yet reserves the right to reject switch solutions for off-board solutions, the Commission should demand that the FBI demonstrate how all parties will be compensated for their efforts. Specifically, the FBI should explain how it will compensate the abandoned in-switch work, how it will pay for the off-board equipment, and how it will reimburse switch manufacturers for the development necessary to make their switches work with the off-board solution.

What's more, the FBI's proposal that the Commission "terminate the extensions, pushing the compliance deadline only as far as is necessary to enable carriers to implement the new solution" is expressly contrary to CALEA. Congress explicitly provided that the FBI could not dictate specific solutions or architecture.¹⁶ Instead, it assigned to carriers, working with their

¹⁶ Section 103(b)(1) of CALEA; 47 U.S.C. § 1002(b)(1).

manufacturers of choice, the responsibility to design and install the equipment necessary to implement CALEA's requirements.